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Office of The Attorney General
State of Connecticut

October 22, 1997

William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In Matter of Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, WT Dkt. No. 97-197

Dear Mr. Caton:

Please find enclosed an original and nine copies of the Joint Reply Comments of Richard Blumenthal, Attorney General of Connecticut and of the Connecticut Siting Council on Proposed Rule Making for filing in the above-referenced docket. If there are any questions pertaining to this filing, please contact the undersigned.

Sincerely yours,

Mark F. Kohler
Assistant Attorney General

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for	)	WT Docket No. 97-197
Relief from State and Local Regulations	)	
Pursuant to Section 332(c)(7)(B)(v) of the	)	
Communications Act of 1934	)	October 22, 1997

JOINT REPLY COMMENTS OF THE CONNECTICUT SITING COUNCIL AND RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT ON PROPOSED RULE MAKING

I. INTRODUCTION

Richard Blumenthal, Attorney General of the State of Connecticut ("Attorney General") and the Connecticut Siting Council ("Council") respectfully submit these joint reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned matter. The Notice of Proposed Rulemaking seeks comments with regard to the procedures that the Commission should employ when it receives a request for review of a state or local action pursuant to § 332(c)(7)(B)(v) of the Communications Act alleging that the state or local entity violated § 332(c)(7)(B)(iv) by regulating the effects of the radio frequency ("RF") emissions of a personal wireless facility in a manner that is inconsistent with the Commission's RF standards. The AG and the Council agree that it is desirable to create a uniform mechanism for confirming compliance that ensures the protection of the public on the one hand and furthers the goal of the rapid development of wireless communications on the other. The Proposed Rulemaking, however, goes beyond simply establishing a procedural framework. It proposes to substantively preempt state and local authorities from exercising their legitimate authority to protect the public

and effectively "stacks the deck" in favor of the entities that both the Commission and state and local authorities are obligated to regulate in the public interest.

II. THE JURISDICTION OF THE COUNCIL AND THE EXPERIENCE IN CONNECTICUT WITH FACILITY SITING.

The Council is an agency of the State of Connecticut having jurisdiction over the siting of various electric, gas and telecommunications facilities. Under present Connecticut law, the Council's jurisdiction for new telecommunications facilities is limited to the following: (1) community antenna television towers and head-end structures, Conn. Gen. Stat. § 16-50i(a)(5); and (2) telecommunication towers, including associated equipment that are (a) owned or operated by the State; (b) owned or operated by a public service company; (c) owned or operated by a certified provider of intrastate telecommunications services; or (d) used in a cellular system. Conn. Gen. Stat. § 16-50i(a)(6).

Any person wishing to construct a new tower within the Council's jurisdiction that may have a substantial adverse environmental effect must obtain a certificate of environmental compatibility and public need from the Council. Conn. Gen. Stat. § 16-50k; Conn. Agencies Regs. §§ 16-50j-71 to -72. The Council also has provisions for regulatory exemptions for modifications of existing towers when the tower height, site boundaries and noise levels are unaffected and the applicant can demonstrate compliance with radio frequency emission standards. Conn. Agencies Regs. § 16-50j-72. This process is usually carried out within two to three weeks upon notice to the Council of the applicant's intent to modify an existing tower. In addition, the Council has jurisdiction over the sharing of all existing towers and may approve or

order sharing whenever such sharing is technically, legally, environmentally and economically feasible and meets public safety concerns. Conn. Gen. Stat. § 16-50aa.

The philosophy that has been fostered by the State of Connecticut is to provide for careful site regulation to protect the public and to encourage the efficient development of necessary telecommunications facilities. The model that the Council uses establishes uniform decision criteria across numerous municipalities, which is critical for the consistent and predictable development of telecommunications networks. The model is generally viewed as effective and is supported by both the telecommunications industry and the public as fair and objective in resolving difficult siting issues.

III. THE COUNCIL'S METHODOLOGY FOR MODELING RF EXPOSURE.

To document compliance with the Commission's RF standards, the Council relies on information supplied by the applicants regarding the proposed installation, including the type of antennas proposed, the height of antennas above ground level, the number of antennas proposed, broadcast frequencies, the number of channels, effective radiated power, ground reflectivity, the nearest point of uncontrolled public access to the facility, the total percentage of the maximum permissible RF exposure standard that each new antenna's power density would occupy, and the total percentage of the maximum permissible RF exposure for all transmitters at the site. The Council's analysis is based explicitly on the guidelines and operation parameters published by the Commission in OET Bulletin 65. An example of a filing in a Council proceeding is attached as Exhibit A.

The Council has been following this procedure since 1985, and since that time has analyzed and ruled on hundreds of telecommunications sites. This process has proven to be fast,

predictable and helpful to foster necessary public acceptance. The simplest proposals are usually analyzed by the Council promptly and formally acknowledged in public within a two week period. Consequently, the Council does not believe that this process and the submittal of relevant supporting information by applicants to be onerous. Indeed, it should take less than an hour to compute such information and a single page to document all calculations. The Council has also found the regulated telecommunications providers to be cooperative and do not object to this process. Overall, the Council's process has struck a healthy balance between the needs of the industry and concerns of the public.

IV. THE COMMISSION'S PROPOSED RULEMAKING EXCEEDS ITS AUTHORITY UNDER THE TELECOMMUNICATIONS ACT OF 1996 AND IS CONTRARY TO THE PUBLIC INTEREST.

The rapid buildout of new wireless service providers has resulted in confusion concerning the scope of federal preemption over state and local government in particular relating to evaluating compliance with the Commission's RF standards. Under § 332(c)(7)(B)(iv), "no state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). The Commission has since established RF emission standards in ET Docket 93-62.

Although § 332(c)(7)(B)(v) permits a person adversely affected by an action or failure to act in violation of § 332(c)(7)(B)(iv) to petition the Commission for relief, nothing in the Telecommunications Act of 1996 or elsewhere authorizes the Commission to preempt state and local authority to confirm compliance with the Commission's standards. Indeed, the Commission

has encouraged state and local government involvement in identification of RF exposure through its issuance of technical bulletins for the confirmation of compliance with Commission standards. As the Commission's OET Bulletin 65 states, "this revised OET Bulletin 65 has been prepared to provide assistance in determining whether proposed or existing transmitting facilities, operations or devices comply with limits for human exposure to radio frequency (RF) fields adopted by the FCC." This approach is effective in providing information to make reasonably quick determinations to confirm compliance and is responsive to public concerns about whether proposed or existing telecommunications facilities are safe.

As telecommunications facilities become more numerous, shared with multiple carriers, and located at lower heights in residential areas, the public should have an opportunity to be informed and assured by state and local authorities that the siting of such facilities are safe. The Commission's proposed rulemaking would undermine state and local authority to do so in several ways, as outlined below.

A. Definitional Issues

The Commission seeks comment on whether, as a matter of definition, nongovernmental entities such as homeowner associations and private land covenants, that may "prove to be an impediment" to personal wireless service providers can be considered "state or local government or any instrumentality thereof" for purposes of § 332(c)(7)(B)(v) review requests. Notice of Proposed Rulemaking, at para. 141. The proposition is astounding. Congress directed its limited preemption in § 332(c)(7)(B)(iv) to government entities. To extend the Commission's authority to private entities would make nonsense of the words of the statute, and the proposal to do so would plainly exceed the authority granted by Congress.

B. Demonstration of RF Compliance

Under the guise of proposing a uniform approach to state and local compliance reviews, the Commission proposes to gut state and local authority retained by Congress. In enacting the provisions of the Telecommunications Act of 1996 at issue here, Congress expressly preserved the authority State and local authority over the siting of personal wireless service facilities, except as specifically limited. 47 U.S.C. § 332(c)(7)(A). Those specific limitations included the prohibition on the regulation of effects from RF emissions where such emissions complied with Commission standards. Id. § 332(c)(7)(B)(iv). Plainly, Congress intended to retain for state and local authorities the power to ensure compliance with standards. Only if state and local authorities regulated RF emissions in a way that precluded facility siting where the Commission's RF standards were satisfied could the Commission take action, through the vehicle of a review request under § 332(c)(7)(B)(v), to preempt the state or local action. Id. § 332(c)(7)(B)(v).

The Commission's proposed rulemaking goes well beyond this. It offers two alternatives for what a state or local commission may do to confirm compliance. The first alternative would establish a procedure for a written certification of compliance for categorically excluded facilities with requests for RF related documents submitted to the Commission for non-categorically excluded facilities. Notice of Proposed Rulemaking, at para. 143. This would be tantamount to no review at all. At a bare minimum, state and local authorities have to have the ability to determine independently compliance. Reliance on the service provider's certification does not provide an independent determination. Indeed, on numerous occasions, the Council has

identified miscalculations made by applicants, which, under the Commission's proposal for a "light showing" would never have been found.

The second alternative differs in that for categorically excluded facilities, the Commission proposes to allow state and local governments to request that the service provider submit a demonstration of compliance. Notice of Proposed Rulemaking, at para. 144. However, the Commission suggests that such compliance requests must not be burdensome and should be uniform. Id. There is no basis for concluding that allowing state and local authorities to request that an applicant demonstrate compliance is an excessive burden on providers. Certainly, the experience in Connecticut, as discussed above, demonstrates the contrary is true. If a state or local authority is using compliance review as a subterfuge for unlawful RF regulation, then the Commission already has the mechanism available under § 332(c)(7)(B)(v) to provide the appropriate relief. The Commission should not effectively gut state and local compliance review, but rather should continue what Congress envisioned. State and local authorities should be allowed to require proof of compliance with regard to all personal wireless service facilities.

C. Procedures for Requests and the Rebuttable Presumption

The basic procedural framework for the Commission's handling of relief requests proposed in the Notice is acceptable, but only if state and local authorities are timely served with copies of the relief request by the provider. See Notice of Proposed Rulemaking, at para. 149. However, the proposed rebuttable presumption that a facility does comply with the Commission's guidelines, thus placing the burden of proving the contrary on the state or local agency, is wholly unwarranted and contrary to the public interest.

The Commission proposes that, when a service provider files a request for relief with the Commission alleging that a state or local authority has violated the proscription of § 332(c)(7)(B)(iv) with regard to RF emission regulation, the state or local authority should have to prove that there was no compliance. The Commission does this on the basis of a general presumption that licensees are in compliance with its rules. Notice of Proposed Rulemaking, at para. 151. This is entirely contrary to the ordinary rules of administrative practice and review. It ignores the usual presumption of validity that attaches to the actions of an administrative body. See, e.g., Connecticut Light & Power Co.v. Department of Public Utility Control, 216 Conn. 627, 637, 591 A.2d 1231 (1991). To establish a presumption in the other direction is an affront to state and local government. The proper presumption that the Commission ought to follow is that state and local authorities are fully capable of properly interpreting and applying federal law. A person wishing to have an presumptively valid administrative action undone should carry the burden of proving otherwise.

Moreover, an ordinary presumption can hardly be said to be an onerous one. After all, as the Commission seeks to make the demonstration of compliance a uniform and simple process, proof by the service provider that the state or local authority exceeded its power should not be difficult. To the extent that it is difficult, the Commission should resolve those unusual disputes on a case-by-case basis, and not by erecting a presumption that unreasonably burdens state and local authorities.

V. CONCLUSION

The AG and the Council support uniform standards for maximum permissible RF exposure, and recommends that these standards be periodically reviewed and updated as

necessary. The AG and the Council also support the continued update and refinement of technical guidelines and believe it is in the public's best interest to be afforded an opportunity to confirm compliance with exposure standards. However, the preemption of state and local procedures to confirm compliance with the Commission's exposure standards is simply unjustified and not in the public interest. The telecommunications industry will be better served by a public process, such as that established by the Council, to confirm compliance and to assure the public that proposed facilities are safe and will not pose a threat to public health. For these reasons, the proposed rulemaking should be rejected.

Respectfully submitted,

RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT, and the CONNECTICUT SITING COUNCIL

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EXHIBIT A

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October 9, 1997

VIA HAND DELIVERY

Mr. Joel M. Rinebold
Executive Director
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

RE: Notice of Exempt Modification -
Sprint Spectrum, L.P. - Guilford TCI Tower

Dear Mr. Rinebold:

Our firm represents TCI Cablevision of South Central Connecticut ("TCI"), which operates a community antenna television ("CATV") system in the franchise area which includes the town of Guilford, Connecticut. The facility was constructed prior to October 1, 1977 and, therefore, pursuant to Conn. Gen. Stat. § 16-50k, no certificate of environmental compatibility and public need was issued by the Council.

Sprint Spectrum, L.P. of Wallingford, Connecticut ("Sprint") plans to install certain telecommunications antennas and related equipment at TCI's existing tower facility located at 10 Tanner Marsh Road, Guilford, Connecticut. Please accept this letter as notification, pursuant to R.C.S.A. § 16-50j-73, of intent to install equipment which would constitute an exempt modification pursuant to R.C.S.A. § 16-50j-72(b).

The existing facility is an approximately 90 foot community antenna television tower located at 10 Tanner Marsh Road in Guilford, Connecticut. Sprint plans to install a 10 foot antenna mast, including an antenna support frame, at approximately the 85 foot level of the tower. Additionally, Sprint plans to construct an 11 foot by 8 foot precast concrete pad between the three legs

of the tower with communications equipment cabinets and a PPC-mini cabinet on an 18-inch concrete foundation.

Attached hereto as Exhibit No. 1, for the Council's information are plans of the Guilford tower facility showing all existing and planned antennas and existing and planned equipment facilities.

The addition of Sprint's antenna and equipment to the Guilford tower site does not constitute a modification within the meaning of General Statutes § 16-50i(d) because the general physical characteristics of the Guilford facility will not be significantly changed or altered. Rather, Sprint's proposed change to the facility constitutes an exempt modification to an existing tower facility as defined by R.C.S.A. § 16-50j-72(b). The addition of the antenna will not increase the height of the 90 foot tower, with existing attachments, nor will it expand the boundaries of the tower site. The additional antenna will have no cognizable impact on noise levels at the tower site boundary.

The addition of the proposed antenna will not increase the total radio frequency electromagnetic radiation power density measured at the tower base to a level at or above the State Department of Environmental Protection standard. Attached as Exhibit No. 2 is a table summarizing the power density at the tower base from the various sources on the tower in relation to the standard. As the table shows, the proposed addition to the tower contributes 5.96% of the State exposure standard, bringing the site total to 5.97% of the standard as calculated for a mixed frequency site.

For the foregoing reasons, the planned addition of Sprint's antenna and associated equipment to the existing Guilford tower site constitutes an exempt modification under R.C.S.A. § 16-50j-72(b).

By copy of this letter, the chief elected official of the Town of Guilford is receiving written notice of the intent to construct an exempt modification to the Guilford tower facility, as required by R.C.S.A. § 16-50j-73.

If you have any questions, please do not hesitate to contact the undersigned. Thank you for your consideration.

Respectfully yours,

TCI CABLEVISION OF SOUTH CENTRAL CONNECTICUT

By Burton B. Cohen /jdp
Burton B. Cohen
Murtha, Cullina, Richter and Pinney
185 Asylum Street
Hartford, CT 06103
Its Attorney

cc: Mr. Edward J. Lynch,
First Selectman

Power Density Analysis

Site Name: Guilford TCI tower
Tower Height: 90 Feet

(MHz)		(watts)	(watts)	(feet)	(mW/cm^2)	(mW/cm^2)	(%)
444.5	1	1	1	90	0.00004	0.297	0.01%

Total Percentage of Maximum Permisable Exposure Before Sprint **0.01%**

Sprint's Contribution:

1957.5	11	122	1342	90	0.0596	1	5.96%

Total Percentage of Maximum Permisable Exposure After Sprint **5.97%**

*Requirements set forth in OET Bulletin 65. Based on NCRP Report No. 86 and ANSI/IEEE C95.1-1992